165-526

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK

165-526

Supreme Court of the United States.

Original No. 9.

EX PARTE ISRAEL C. KOLLOCK, PETITIONER.

ISRAEL C. KOLLOCK,
Petitioner.

JEREMIAH M. WILSON,
HENRY E. DAVIS,
Attorneys for Petitioner.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

Original No. —.

EX PARTE ISRAEL C. KOLLOCK, PETITIONER.

To the Honorable the
Supreme Court of the United States:

The petitioner, Israel C. Kollock, respectfully represents as follows:

1. He is a citizen of the United States and a resident of the District of Columbia, and is now unlawfully restrained of his liberty by the marshal of the United States in and for the District of Columbia, to wit, Albert A. Wilson.

2. The facts concerning the said unlawful detention of the petitioner and the claim of authority under and by virtue of which he is detained are as follows: Heretofore, to wit, on the 6th day of April, A. D. 1896, and on the 20th day of April, A. D. 1896, respectively, in the supreme court of the District of Columbia, holding a criminal term, there were filed against the petitioner two certain indictments purporting to be based upon the act of the Congress of the United States approved the 2d day of August, A. D. 1886, commonly known as the oleomargarine law, for alleged violation of the provisions of the said law, the first of the

said indictments alleging a violation by the petitioner of the sixth section of the said act, and the second of the said indictments alleging the carrying on by the petitioner, in the District of Columbia, of the business of a retail dealer in oleomargarine without having paid the special tax therefor. Afterwards, to wit, on the 21st day of April, A. D. 1896, the petitioner demurred to each of the said indictments, alleging, among other things, as grounds of demurrer the unconstitutionality of the said act of Congress aforesaid, but the said demurrers and each of them were thereafter by the said court overruled, and the petitioner was ordered to plead and did plead not guilty to the said indictments and each of them and was thereupon tried and convicted upon the said indictments and each of them, and upon such conviction the petitioner was sentenced by said court, under the first of the said indictments, to imprisonment in the common jail of the District of Columbia for the period of three hours, to take effect from the date of his arrival at said jail, and to pay a fine of four hundred dollars and the costs of prosecution, amounting to twenty-nine dollars and fifty cents, and in default of said fine and costs to stand committed further until paid, and under the second of the said indictments to pay a fine of one hundred dollars and the costs of prosecution, amounting to twenty-five dollars, and in default of payment of said fine and costs to stand further committed until paid. Thereupon the petitioner duly appealed to the Court of Appeals of the District of Columbia, which latter court affirmed in all things the judgments and sentences aforesaid and each of them, and the petitioner was thereupon, on, to wit, the 14th day of December, A. D. 1896, committed to the custody of the said marshal of the United States in and for the District of Columbia, under the said judgments and sentences, and the said marshal took the petitioner into his custody and now confines him in such custody and deprives him of his liberty by virtue thereof.

3. The said confinement and imprisonment of the petitioner and the said deprivation of his liberty as aforesaid are unlawful and without authority, and are made and continue in violation of the laws of the United States, for these, among other, reasons: The act under which said indictments and each of them was found is contrary to the Constitution of the United States, in this, among other things, that it is not within the power of the Congress of the United States under the Constitution of the United States to delegate to the Commissioner of the Internal Revenue, or the Secretary of the Treasury of the United States, or any other person, authority or power to determine what acts shall be criminal; and the said act of Congress aforesaid does not sufficiently define, or define at all, what acts done or omitted to be done within the supposed purview of the said act shall constitute an offense or offenses against the United States.

Wherefore the petitioner prays that the writ of *habeas corpus* may issue from this Court, directed to the said Albert A. Wilson, marshal as aforesaid, commanding him to produce the petitioner before this Court, together with the cause of his detention, and also, if need be, that a writ of certiorari be directed to the clerk of the said supreme court of the District of Columbia requiring him to bring into this Court a full, complete, and duly certified copy of the records and each of them of the entire proceedings against the petitioner in the premises, and that pending this petition and upon the hearing thereof this Court will, by such order in the premises as may be deemed proper, admit the petitioner to bail.

ISRAEL C. KOLLOCK,
Petitioner.

JEREMIAH M. WILSON,
HENRY E. DAVIS,
Attorneys for Petitioner.

DISTRICT OF COLUMBIA, *ss:*

Before me, a notary public in and for the District aforesaid, personally appeared Israel C. Kollock, who, being by me first duly sworn, deposes and says that he has read the foregoing petition by him subscribed and knows the contents thereof, and that the facts in the said petition stated and set forth are true.

ISRAEL C. KOLLOCK.

Subscribed and sworn to before me this 14th day of December, A. D. 1896.

MASON N. RICHARDSON,

[SEAL.] *Notary Public.*

65-5[illegible]

165-526

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

NO. 9, ORIGINAL.

EX PARTE: IN THE MATTER OF ISRAEL C. KOLLOCK, PETITIONER.

RETURN TO RULE.

FILED DECEMBER 29, 1896.

DISTRICT OF COLUMBIA, *ss*:

Before me, a notary public in and for the District aforesaid, personally appeared Israel C. Kollock, who, being by me first duly sworn, deposes and says that he has read the foregoing petition by him subscribed and knows the contents thereof, and that the facts in the said petition stated and set forth are true.

ISRAEL C. KOLLOCK.

Subscribed and sworn to before me this 14th day of December, A. D. 1896.

MASON N. RICHARDSON,

[SEAL.] *Notary Public.*

165-526

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

NO. 9, ORIGINAL.

EX PARTE: IN THE MATTER OF ISRAEL C. KOLLOCK, PETITIONER.

RETURN TO RULE.

FILED DECEMBER 29, 1896.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

NO. 9, ORIGINAL.

EX PARTE: IN THE MATTER OF ISRAEL C. KOLLOCK, PETITIONER.

Return of Albert A. Wilson, marshal of the United States for the District of Columbia.

Now comes Albert A. Wilson, marshal of the United States for the District of Columbia, and for a return to the rule to show cause issued herein respectfully shows:

That, until the release of the aforesaid Israel C. Kollock, as hereinafter stated, he held the body of the said Israel C. Kollock in his custody, as alleged in the petition filed herein, to be conveyed to the United States jail of the District of Columbia, pursuant to the judgments and sentences of the supreme court of the said District, mentioned in said petition.

The said marshal of the United States for the District of Columbia further shows that the aforesaid Israel C. Kollock was released from custody on bail on the fourteenth day of December, 1896, in compliance with the order of this honorable court in the premises.

ALBERT A. WILSON,
U. S. Marshal.

Subscribed and sworn to before me this eighteenth day of December, A. D. 1896.

[SEAL.]

JOHN R. YOUNG,
Clerk Supreme Court District of Columbia.

(Indorsed:) Supreme Court, United States. Original No. 9. Ex parte: In the matter of Israel C. Kollock, petitioner. Return of Albert A. Wilson, United States marshal for the District of Columbia, to the rule to show cause issued herein.

10389

Office Supreme Court, U. S.
FILED
JAN 15 1897
JAMES H. McKENNEY,
Clerk.

165-538

THE LAW ASSOCIATION
OF
PHILADELPHIA.

Supreme Court of the United States.

OCTOBER TERM, 1896.

Ex Parte SAMUEL J. McCAULLY. Original, No. 8.

Ex Parte ISRAEL C. KOLLOCK. Original, No. 9.

Ex Parte WILLIAM O. LUSBY. Original, No. 10.

BRIEF FOR THE PETITIONERS.

Jeremiah M. Wilson,
Henry E. Davis,
Counsel for the Petitioners.

Judd & Detweiler, Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

EX PARTE SAMUEL J. McCAULLY. Original, No. 8.

EX PARTE ISRAEL C. KOLLOCK. Original, No. 9.

EX PARTE WILLIAM O. LUSBY. Original, No. 10.

BRIEF FOR THE PETITIONERS.

I.

These are cases in *habeas corpus* arising under the following conditions:

Each of the petitioners was indicted, tried, and convicted in the supreme court of the District of Columbia for violation of the provisions of the act of Congress approved the 2d day of August, A. D. 1886 (24 Stats., 209; Richardson's Sup., 2d ed., 505), commonly known as the oleomargarine law. The petitioner Kollock appealed to the Court of Appeals of the District of Columbia, by which court his sentence was affirmed. The petitioner McCaully was sentenced by the trial court to pay a fine of five hundred dollars and

the costs of prosecution, amounting to twenty-eight dollars and fifty cents. The petitioners Kollock and Lusby were each sentenced to both fine and imprisonment, and each of the three petitioners was sentenced in default of payment of his fine to stand committed until the same should be paid. On the 14th day of December, A. D. 1896, each of the petitioners was committed to the custody of the United States marshal for the District of Columbia.

On the same day, namely, the 14th day of December, A. D. 1896, each of the petitioners filed his petition in this Court, alleging that he was deprived of his liberty unlawfully, in that his confinement and imprisonment was in violation of the Constitution and laws of the United States, for the reason that the act under which he was indicted is contrary to the Constitution of the United States, in this, among other things, that it is not within the power of the Congress of the United States under the Constitution of the United States to delegate to the Commissioner of Internal Revenue or the Secretary of the Treasury of the United States, or any other person, an authority or power to determine what acts shall be criminal, and the said act of Congress aforesaid does not sufficiently define, or define at all, what acts done or omitted to be done within the supposed purview of the said act shall constitute an offense or offenses against the United States.

The said marshal, to wit, Albert A. Wilson, has made return that he held the bodies of the said petitioners pursuant to the judgments and sentences of the supreme court of the District of Columbia in the several petitions mentioned, until the said 14th day of December, A. D. 1896, when they were each released from custody on bail in compliance with the orders of this Court in that behalf.

II.

ARGUMENT.

The act in question consists of twenty-one sections, as follows:

SEC. 1. Defines butter.

SEC. 2. Defines oleomargarine.

SEC. 3. Imposes special taxes on manufacturers, wholesale dealers and retail dealers in oleomargarine, and defines them as follows: Manufacturer, every person who manufactures oleomargarine for sale; wholesale dealer, every person who sells or offers for sale oleomargarine in the original manufacturer's packages; retail dealer, every person who sells oleomargarine in less quantities than ten pounds at one time.

SEC. 4. Prescribes penalties for carrying on business as manufacturer, wholesale dealer, or retail dealer without payment of tax.

SEC. 5. Prescribes duty of manufacturer as to notices, &c., keeping books, &c., and conduct of business.

SEC. 6. Provides that all oleomargarine shall be packed by the manufacturer in packages, each containing not less than ten pounds, and marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; that all sales by manufacturers and wholesale dealers shall be in original stamped packages; that retail dealers must sell only from original stamped packages in quantities not exceeding ten pounds, and shall pack the oleomargarine sold by them in suitable packages, marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, and that every person who knowingly sells or offers for sale, or delivers or offers

to deliver, any oleomargarine in any other form than in packages as above described, or who packs in any package any oleomargarine in any manner contrary to law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that required by law shall be fined and imprisoned.

SEC. 7. Provides that every manufacturer shall affix a label on each package manufactured under penalty, &c.

SEC. 8. Provides a tax on the manufacture, to be represented by coupon stamps.

SEC. 9. Provides for assessment of tax on oleomargarine sold without using stamps.

SEC. 10. Provides an additional tax on imported oleomargarine, and prescribes certain things to be done in relation thereto.

SEC. 11. Provides penalty for purchasing or receiving for sale any oleomargarine not branded or stamped according to law.

SEC. 12. Provides penalty for purchasing or receiving for sale any oleomargarine from any manufacturer who has not paid the special tax.

SEC. 13. Provides for destruction of stamps on stamped packages when emptied.

SEC. 14. Provides for chemist and microscopist, &c., in the office of the Commissioner of Internal Revenue; that the Commissioner shall decide what substances are to be taxed under the act, &c.

SEC. 15. Provides for forfeiture of packages if not stamped, or if deleterious, and a penalty for removing or defacing stamps or brands on packages.

SEC. 16. Provides for exportation of oleomargarine.

SEC. 17. Provides penalty for fraud by manufacturer in relation to tax.

SEC. 18. Provides penalty for failure to do any of the things required by law or doing any of the things prohib-

ited by the act in case no specific penalty or punishment is imposed by any other section of the act.

SEC. 19. Provides for recovery of fines, &c.

SEC. 20. Provides that the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may make all needful regulations for carrying the act into effect.

SEC. 21. Provides that the act shall go into effect ninety days after passage.

Section 6 of the act is in full as follows:

"That all oleomargarine shall be packed by the manufacturer thereof in firkins, tubs or other wooden packages not before used for that purpose, each containing not less than ten pounds, and marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and all sales made by manufacturers of oleomargarine, and wholesale dealers in oleomargarine shall be in original stamped packages. Retail dealers in oleomargarine must sell only from original stamped packages, in quantities not exceeding ten pounds, and shall pack the oleomargarine sold by them in suitable wooden or paper packages, which shall be marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe. Every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine in any other form than in new wooden or paper packages as above described, or who packs in any package any oleomargarine in any manner contrary to law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that required by law, shall be fined for each offense not more than one thousand dollars, and be imprisoned not more than two years."

2. This act is unconstitutional for the reason that Congress cannot delegate to the Commissioner of Internal Revenue, acting either alone or with any other person, authority

and power to determine what acts shall be criminal, and that the act does not define what act done or omitted to be done shall constitute a criminal offense.

a. There is no common-law crime against the United States. The legislative authority must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of it before a given act can be deemed an offense against the United States.

U. S. *vs.* Hudson, 7 Cr., 32.
U. S. *vs.* Coolidge, 1 Wh., 415.
U. S. *vs.* Terrel, Hempst., 411.

The courts of the United States, to determine what constitutes an offense against the United States, must resort to the statutes of the United States enacted in pursuance of the Constitution.

U. S. *vs.* Terrel, *ubi supra*.

No offense against the United States can therefore be lawfully created by a statute which attempts to make criminal an act which may be in violation of a regulation thereafter to be formulated by some department or officer of Government. If the doing or not doing the act depends upon its prescription or prohibition by some person named in the statute after the statute shall have passed from the domain of Congress, such act cannot be deemed an offense by the courts of the United States, because, first, Congress cannot delegate its power to declare offenses any more than it can delegate any other of its legislative functions (Stoutenburgh *vs.* Hennick, 129 U. S., 141), and, secondly, Congress cannot make criminal an act unknown and unconceived at the time of its action. It is not the law of the United States that Congress can say of a given officer: "We do not know what he is going to declare to be an offense, but what he may so declare is hereby made an offense." The clear and

jealously guarded division of the powers of government into legislative, executive, and judicial forbids the mere entertaining such a thought.

Cin., &c., R'd Co. *vs.* Comm'rs, 1 Oh. St., 77, 84 *et seq.*
Santo *vs.* State, 2 Iowa, 165.
Sutherland, Stat. Const., sec. 69.

"One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain, and by the constitutional agency alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibilty by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, or patriotism of any other body for those to whom alone the people have seen fit to confide this sovereign trust."

Cooley, Const. Lims., sixth ed., 137.
Barto *vs.* Himrod, 8 N. Y., 483, 491.
Rice *vs.* Foster, 4 Harr, 479, 488.
State *vs.* Swisher, 17 Tex., 441, 448.
Exp. Wall, 48 Cal., 279, 314.

And Congress cannot adopt prospectively future acts of State legislation on any given subject, because that would be a delegation of legislative power.

Sedg. Stat. and Const. Law, 550.
U. S. *vs.* Knight, 3 Sumn., 358, 369.
Wayman *vs.* Southard, 10 Wh., 1, 47, 48.
In re Watson Freeman, 2 Curtis, p. 495.

b. The main question is well considered in United States *vs.* Eaton, 144 U. S., 677, in which the very law under discussion was dealt with. There the Court says (pp. 687–'8):

"It is well settled that there are no common-law offenses against the United States (citing authorities).

"It was said by this Court in Morrill *vs.* Jones, 106 U. S., 466, 467, that the Secretary of the Treasury cannot by his regulations alter or amend a revenue law, and that all he can do is to regulate the mode of proceeding to carry into effect *what Congress has enacted.* . . . It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense. . . . Regulations prescribed by the President and by the heads of departments under authority granted by Congress may be regulations prescribed by law so as lawfully to support acts done under them, and may thus have in a proper sense the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do a thing a criminal offense in a citizen *where a statute does not distinctly make the neglect in question a criminal offense.*"

And the applicability of this language to the case at bar is only strengthened by what was said by the Court in *Caha vs. U. S.*, 152 U. S., 211, relied on by the Government in the court below. In the latter case the Court distinctly says, "This is not a case in which the violation of a mere regulation of a department is adjudged a crime" (p. 218), and points out that in the Eaton case "the wrong was in violation of a duty imposed only by a regulation of the Treasury Department" (p. 219), whereas of the Caha case it says, "This [the Eaton case], it will be observed, is very different from the ease at bar, where no violation is charged of any regulation made by the department. All that can be said is that a place and an opportunity were provided by the regulations of the department at which the defendant committed *the crime of perjury, in violation of section 5392.* We have no doubt that false swearing in a land contest before the local land office, in respect to a homestead entry, is perjury *within the scope of said section*" (pp. 220–'1).

The distinction is apparent between a regulation supposed to create an offense and a regulation providing for carrying into effect an enactment creating an offense. The

former is plainly substantive legislation; the latter is strictly regulation.

c. And it does not aid the discussion to say that in effect Congress does declare the offense in question, because it declares it an offense to violate the regulations of the Commissioner: in other words, that the statute does in terms define a crime, namely, disobedience of the regulations to be prescribed by the Commissioner.

This contention obviously is a begging of the question, which is whether Congress can so define a crime, and so we are pushed back to the question above discussed.

It is said in the brief of the Solicitor General (p. 7) as follows:

"It may be conceded that Congress, having prohibited the sale of oleomargarine except in packages marked, stamped, and branded, has cast upon the Commissioner of Internal Revenue the duty of providing a design, form, and figure of such stamps, brands, and marks; and until the Commissioner of Internal Revenue conceives, expresses, and publishes the design or form or figure which *he* has chosen and determined upon for such stamps, marks, or brands, the law cannot be executed or its penalties enforced."

It is confidently submitted that this concession yields the case to the petitioners. Nor is this fact in anywise weakened by what is said by the Court of Appeals of the District of Columbia in its opinion in the case of Prather *vs.* The United States, printed as an appendix to the Solicitor General's brief, pages 17 to 27. By that opinion the case of O'Neil *vs.* The Insurance Co., 166 Penna. State, 72, is sought to be distinguished from the cases at bar. It is impossible for counsel for the petitioners to apprehend the discrimination sought to be made. In that opinion (see the Solicitor General's brief, pages 24 and 25), it is admitted that the act of the State of Pennsylvania prescribing the standard policy referred to "was no mere ministerial or executive duty, but the highest

exercise of legislative power," and that that "case is an excellent illustration of the fundamental principle already stated, that the legislative power cannot be delegated, but it is not authority to show that an executive officer should not furnish a stamp or a brand or a mark to show that a tax had been paid, or that the legislative authority might not provide a penalty for the failure to procure *such* a stamp, mark, or brand."

The inapplicability of the statement of the Court of Appeals in its opinion to the law under consideration in the cases at bar must be manifest on the most casual reading. The law in question in the particular in which it is impeached does not provide that an executive officer shall "furnish a stamp or a mark or a brand to show that a tax had been paid." On the contrary, the law provides, without reference to a tax, that the packages in which oleomargarine may be packed shall be "packages . . . marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe," and that "every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine in any other form than in . . . packages as above described . . . shall be fined . . . and imprisoned."

The misapplication, or may it be said misapprehension? by the Court of Appeals of the District of Columbia of the case of O'Neil *vs.* The Insurance Co. would seem to be manifest. In that case, according to the Court of Appeals, the Pennsylvania court did not decide "that an executive officer should not furnish a stamp or a mark or a brand to show that a tax had been paid," whereas in the cases at bar the point is that Congress has attempted to delegate to the Commissioner of Internal Revenue the power to say how a package of oleomargarine shall be branded without regard to the payment of a tax or evidence thereof before it can be sold, and to make the selling of a package of oleo-

margarine without such brand a criminal offense. Very clearly, if the act of Congress be a law, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may today prescribe that every package of oleomargarine must be stamped with letters in gilt, two inches square, indicating the character of the contents, and tomorrow he may prescribe that such package shall be stamped with letters in Venetian blue, one inch square, to indicate its contents. The unavoidable result is that in order to know whether he is about to become a criminal, every dealer in oleomargarine must daily resort to the office of the Commissioner of Internal Revenue to find what it is that he is prohibited to do. If this is not putting the legislative power in commission with the Commissioner of Internal Revenue, it is impossible for counsel for the petitioners to understand what is. As already stated, in effect the act of Congress supposed to be a law says:

"We do not know what the Commissioner of Internal Revenue may from time to time declare to be an offense, because we do not know what particular form of brand he may prescribe to indicate the contents of a package of oleomargarine, but we enact that disregard of whatever he may so declare is hereby made an offense."

As stated in the case of O'Neil *vs.* The Insurance Co., it is not to the legislature and its records that the citizen may go to find what he is forbidden to do, but in order so to find he must go daily to the office of the Commissioner of Internal Revenue. The effect of this, as a delegation of legislative authority, seems too plain for further argument.

The following extracts from the opinion of the Pennsylvania supreme court (166 Penna. State, pp. 78, 79, and 80) are so pertinent as to justify their setting forth at length:

"The act of 1891 is a delegation of legislative power, because—

"First. The act does not fix the terms and conditions of the policy the use of which it commands.

"Second. It delegates the power to prescribe the form of the policy and the conditions and restrictions to be added to and made part of it to a single individual.

"Third. The appointee clothed with this power is not named, but is designated only by his official title. He is the person who may happen to be insurance commissioner when the time comes to prepare the form for the standard policy for insurance against fire.

"Fourth. The appointee is not required to report his work to the body appointing him, but simply to file in his own office the form of policy he has devised. It does not become part of the statute in fact, is not recorded in the statute book, and no trace of it can be found among the records of either branch of the legislature.

"Fifth. The act was approved in April, 1891. The appointee had until the following November to prepare and file the form of policy over which, when filed, the legislature had no control whatever. They did not consider, they had no knowledge of, the form which they required all companies doing business in the State to adopt, and the use of which they compelled by heavy penalties.

"The elementary books divide a statute into three parts—the declaratory, the directory, and the vindicatory. In this statute the legislature furnished the first and third. It delegated the preparation of the second. It declared in effect the need of a standard form of policy. It provided punishment for the failure to use such form when provided, but it turned the preparation of the form over to its appointee and gave him six months in which to do his work and file a copy of it in his own office. Whoever might be interested in knowing the directory part of the statute and understanding what it was he was required to do had to go beyond the act of assembly and inquire of the appointee of the legislature what it was he had filed in his own office of which the people of the Commonwealth were bound to take notice at their peril. . . .

"We do not see how a case could be stated that would show a more complete and unconstitutional surrender of the legislative function to an appointee than that presented by the act of 1891. By its provisions the legislature says in effect to its appointee: 'Prepare just such a policy or contract as you please; we do not care to know what it is. The governor shall have no opportunity to veto it. File it

in your own office and we will compel its adoption, whether it is right or wrong, by the punishment of every company, officer, or agent who hesitates to use it.' . . .

"It is not to be supposed that a law really mischievous in its operations could pass both houses of the legislature unchallenged. If by reason of any complication of circumstances this should happen in any given case, then the people have a remaining safeguard in the veto power possessed by the governor. The act of 1891 steered past both legislative discussion and executive veto, and vested in the insurance commissioner the power to fill in its directory provisions, and supply the form of insurance contract it was to enforce, without even the knowledge of the legislature or the governor of a single one of its many provisions that were to be bound by fines and penalties on insurers and insured all over the Commonwealth."

Anderson v. Manchester &c. Co. 59 Minn. 182-202.

In the brief of the Solicitor General, page 8, section 3446 of the Revised Statutes of the United States is quoted in support of the supposed law in question. That section, referring to stamps already described, uses the following significant language:

"But in no case shall such renewal or change extend to an abandonment of the *general character* of the stamps above mentioned."

Not only is it no argument to quote another possibly invalid law of Congress, but also it is to the point that in authorizing the Secretary of the Treasury and Commissioner of Internal Revenue to "alter, renew, or change the form, style, and device of any stamp, mark, or label used under any provision of the laws" Congress was careful in the section quoted to hold the Secretary of the Treasury and the Commissioner of Internal Revenue to a "general character" of stamps already defined by it. "The obvious reply" to the objections advanced by the petitioners to the law in question, supposed to be found in section 3446 of the Revised Statutes, therefore plainly begs the question.

3. The contentions in the brief of the Solicitor General, pages 9 and 10, that "it may as well be argued that the Revised Statutes were intended to afford protection to purchasers of distilled spirits, tobacco, snuff, and cigars by giving them notice that they were getting those articles and not spurious imitations of them as to argue that such was the object of the oleomargarine act," and, pages 13 and 14, that "Congress had power to prohibit altogether the sale of oleomargarine; it had power to impose conditions and terms upon which it may be sold; it permitted it to be sold in wooden or paper packages, but it prescribed as an essential condition that the said packages 'should be marked, stamped, and branded,'" are in the face of the confessed delegated powers of Congress. If it were contended that these provisions might be supported under the interstate-commerce powers of Congress, there might be some force in the contention; but such is not the case. The oleomargarine act does not profess to regulate commerce between the States, but, on the contrary attempts to prescribe the marking of packages containing oleomargarine which may never leave the confines of a given State. Under what provision of the Constitution may Congress be claimed to have such power? If it be said that it is a part of the police power, the answer is that Congress has no such power except in those portions of territory over which Congress has exclusive jurisdiction, and the act is not limited and does not purport to be limited to such. The fact is that Congress has assumed to exercise the power throughout the United States of protecting all citizens from fraudulent imposition—a power which Congress clearly lacks under the Constitution. By what right can Congress declare that a given package shall be stamped "This contains butter" or "This contains oleomargarine," or that a given package contains any particular substance? Such legislation is not within any of the delegated powers of Congress, and the right to prescribe such designation is a power belonging to the States and not delegated to the

General Government. This would seem too clear for argument.

4. It is further said in the brief of the Solicitor General, page 14, that the "petitioners . . . knew that the stamp required was a stamp that had to be purchased from the Government, and that it had represented the tax imposed by the Government for revenue purposes upon all dealers in oleomargarine for the privilege of conducting such business." This, it is submitted, is a clear misapprehension of the case. The brands prescribed by section 6 of the act were not intended to indicate that the tax had been paid. The Government revenue stamp indicated that. The brands in question are brands intended to indicate the contents of the packages, and it is these which the petitioners claim should be prescribed by Congress, if, indeed, Congress could prescribe even these. The point is that the offense denounced by the statute consists in the not branding packages of oleomargarine so as to indicate their contents, and that, instead of its prescribing what these brands shall be, Congress has committed the prescription of such brands to the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. To put the case in its simplicity, it is as though Congress had enacted as follows:

"That it shall be unlawful for any person to sell oleomargarine except in packages so branded as in the opinion of the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to notify all purchasers that the package contains oleomargarine."

This would clearly leave it to the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to undertake to prescribe what brands in his opinion would be sufficient to warn purchasers; and this of necessity would drive every vendor of oleomargarine to the office of the Commissioner of Internal Revenue to learn

how the package should be stamped in order to avoid fine and imprisonment.

It is beside the question to quote the decisions in U. S. *vs.* Ford, 50 Fed. Rep., 467, and Prather *vs.* U. S., Court of Appeals of the District of Columbia, for it is the very view expressed by these tribunals which the petitions in these cases seek to bring under review. Those decisions are entitled to weight only on their merits and not merely because they have been rendered by the courts rendering them.

As respects the opinion in U. S. *vs.* Ford, it ought to suffice to note that that was an oral opinion by Thayer, district judge, and really contains no argument in support of his conclusion. In fact, the opinion clearly begs the question, the following language, to be found on pages 468 and 469 of the report, being its essence:

"The offense charged in the indictment is one fully described in the sixth section of the act. The marks and brands prescribed by the Commissioner are such as he was specially authorized to prescribe."

It is submitted with all deference that this is the very question at issue, and surely the discussion cannot be helped by so plainly bald a statement. As against this naked assertion and the reasoning of the Court of Appeals of the District of Columbia in the Prather case, we confidently submit the clear, forcible argument of the Pennsylvania court in the O'Neil case.

For the convenience of the Court the entire oleomargarine act as amended is printed as an appendix hereto.

Respectfully submitted.

JEREMIAH M. WILSON,
HENRY E. DAVIS,
Counsel for the Petitioners.

APPENDIX.

AN ACT defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of this act the word "butter" shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter.

SEC. 2. That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as "oleomargarine," namely: All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, vegetable oil, annotto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter.

SEC. 3. That special taxes are imposed as follows:

Manufacturers of oleomargarine shall pay six hundred dollars. Every person who manufactures oleomargarine for sale shall be deemed a manufacturer of oleomargarine.

Wholesale dealers in oleomargarine shall pay four hundred and eighty dollars. Every person who sells or offers for sale oleomargarine in the original manufacturer's packages shall be deemed a wholesale dealer in oleomargarine. But any manufacturer of oleomargarine who has given the required bond and paid the required special tax, and who sells only oleomargarine of his own production, at the place of manufacture, in the original packages to which the tax-paid stamps are affixed, shall not be required to pay the

special tax of a wholesale dealer in oleomargarine on account of such sales.

Retail dealers in oleomargarine shall pay forty-eight dollars. Every person who sells oleomargarine in less quantities than ten pounds at one time shall be regarded as a retail dealer in oleomargarine. And sections thirty-two hundred and thirty-two, thirty-two hundred and thirty-three, thirty-two hundred and thirty-four, thirty-two hundred and thirty-five, thirty-two hundred and thirty-six, thirty-two hundred and thirty-seven, thirty-two hundred and thirty-eight, thirty-two hundred and thirty-nine, thirty-two hundred and forty, thirty-two hundred and forty-one, and thirty-two hundred and forty-three of the Revised Statutes of the United States are, so far as applicable, made to extend to and include and apply to the special taxes imposed by this section, and to the persons upon whom they are imposed: **Provided*, That in case any manufacturer of oleomargarine commences business subsequent to the thirtieth day of June in any year, the special tax shall be reckoned from the first day of July in that year, and shall be five hundred dollars.

SEC. 4. That every person who carries on the business of a manufacturer of oleomargarine without having paid the special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined not less than one thousand and not more than five thousand dollars; and every person who carries on the business of a wholesale dealer in oleomargarine without having paid the special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined not less than five hundred nor more than two thousand dollars; and every person who carries on the business of a retail dealer in oleomargarine without having paid the special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined not less than fifty nor more than five hundred dollars for each and every offense.

SEC. 5. That every manufacturer of oleomargarine shall file with the collector of internal revenue of the district in which his manufactory is located such notices, inventories, and bonds, shall keep such books and render such returns of material and products, shall put up such signs and affix

* Repealed; see section 53, act of October 1, 1890.

such number to his factory, and conduct his business under such surveillance of officers and agents as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require. But the bond required of such manufacturer shall be with sureties satisfactory to the collector of internal revenue, and in a penal sum of not less than five thousand dollars; and the sum of said bond may be increased from time to time and additional sureties required at the discretion of the collector or under instructions of the Commissioner of Internal Revenue.

SEC. 6. That all oleomargarine shall be packed by the manufacturer thereof in firkins, tubs, or other wooden packages not before used for that purpose, each containing not less than ten pounds, and marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and all sales made by manufacturers of oleomargarine and wholesale dealers in oleomargarine shall be in original stamped packages. Retail dealers in oleomargarine must sell only from original stamped packages, in quantities not exceeding ten pounds, and shall pack the oleomargarine sold by them in suitable wooden or paper packages which shall be marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe. Every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine in any other form than in new wooden or paper packages as above described, or who packs in any package any oleomargarine in any manner contrary to law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that required by law, shall be fined for each offense not more than one thousand dollars and be imprisoned not more than two years.

SEC. 7. That every manufacturer of oleomargarine shall securely affix, by pasting, on each package containing oleomargarine manufactured by him, a label on which shall be printed, besides the number of the manufactory and the district and State in which it is situated, these words: "Notice—The manufacturer of the oleomargarine herein contained has complied with all the requirements of law. Every person is cautioned not to use either this package again or the stamp thereon again, nor to remove the con-

tents of this package without destroying said stamp, under the penalty provided by law in such cases." Every manufacturer of oleomargarine who neglects to affix such label to any package containing oleomargarine made by him, or sold or offered for sale by or for him, and every person who removes any such label so affixed from any such package, shall be fined fifty dollars for each package in respect to which such offense is committed.

SEC. 8. That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of two cents per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound. The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section.

SEC. 9. That whenever any manufacturer of oleomargarine sells, or removes for sale or consumption, any oleomargarine upon which the tax is required to be paid by stamps, without the use of the proper stamps, it shall be the duty of the Commissioner of Internal Revenue, within a period of not more than two years after such sale or removal, upon satisfactory proof, to estimate the amount of tax which has been omitted to be paid, and to make an assessment therefor and certify the same to the collector. The tax so assessed shall be in addition to the penalties imposed by law for such sale or removal.

SEC. 10. That all oleomargarine imported from foreign countries shall, in addition to any import duty imposed on the same, pay an internal-revenue tax of fifteen cents per pound, such tax to be represented by coupon stamps as in the case of oleomargarine manufactured in the United States. The stamps shall be affixed and canceled by the owner or importer of the oleomargarine while it is in the custody of the proper custom-house officers; and the oleomargarine shall not pass out of the custody of said officers until the stamps have been so affixed and canceled, but shall be put up in wooden packages, each containing not less than ten pounds, as prescribed in this act for oleomargarine manufactured in the United States, before the stamps are affixed;

and the owner or importer of such oleomargarine shall be liable to all the penal provisions of this act prescribed for manufacturers of oleomargarine manufactured in the United States. Whenever it is necessary to take any oleomargarine so imported to any place other than the public stores of the United States for the purpose of affixing and canceling such stamps, the collector of customs of the port where such oleomargarine is entered shall designate a bonded warehouse to which it shall be taken, under the control of such customs officer as such collector may direct; and every officer of customs who permits any such oleomargarine to pass out of his custody or control without compliance by the owner or importer thereof with the provisions of this section relating thereto, shall be guilty of a misdemeanor, and shall be fined not less than one thousand dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than three years. Every person who sells or offers for sale any imported oleomargarine, or oleomargarine purporting or claimed to have been imported, not put up in packages and stamped as provided by this act, shall be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than two years.

SEC. 11. That every person who knowingly purchases or receives for sale any oleomargarine which has not been branded or stamped according to law shall be liable to a penalty of fifty dollars for each such offense.

SEC. 12. That every person who knowingly purchases or receives for sale any oleomargarine from any manufacturer who has not paid the special tax shall be liable for each offense to a penalty of one hundred dollars, and to a forfeiture of all articles so purchased or received, or of the full value thereof.

SEC. 13. That whenever any stamped package containing oleomargarine is emptied, it shall be the duty of the person in whose hand the same is, to destroy utterly the stamps thereon; and any person who willfully neglects or refuses so to do shall for each such offense be fined not exceeding fifty dollars, and imprisoned not less than ten days nor more than six months. And any person who fraudulently gives away or accepts from another, or who sells, buys, or uses for packing oleomargarine, any such stamped package, shall for each such offense be fined not exceeding one hundred dol-

lars, and be imprisoned not more than one year. Any revenue officer may destroy any emptied oleomargarine package upon which the tax-paid stamp is found.

SEC. 14. That there shall be in the office of the Commissioner of Internal Revenue an analytical chemist and a microscopist, who shall each be appointed by the Secretary of the Treasury, and shall each receive a salary of two thousand five hundred dollars per annum; and the Commissioner of Internal Revenue may, whenever in his judgment the necessities of the service so require, employ chemists and microscopists, to be paid such compensation as he may deem proper, not exceeding in the aggregate any appropriation made for that purpose. And such Commissioner is authorized to decide what substances, extracts, mixtures, or compounds which may be submitted for his inspection in contested cases are to be taxed under this act; and his decision in matters of taxation under this act shall be final. The Commissioner may also decide whether any substance made in imitation or semblance of butter, and intended for human consumption, contains ingredients deleterious to the public health; but in case of doubt or contest his decisions in this class of cases may be appealed from to a board hereby constituted for the purpose, and composed of the Surgeon General of the Army, the Surgeon General of the Navy, and the Commissioner* of Agriculture; and the decisions of this board shall be final in the premises.

SEC. 15. That all packages of oleomargarine subject to tax under this act that shall be found without stamps or marks as herein provided, and all oleomargarine intended for human consumption which contains ingredients adjudged, as hereinbefore provided, to be deleterious to the public health, shall be forfeited to the United States. Any person who shall willfully remove or deface the stamps, marks, or brands on package containing oleomargarine taxed as provided herein shall be guilty of a misdemeanor, and shall be punished by a fine of not less than one hundred dollars nor more than two thousand dollars, and by imprisonment for not less than thirty days nor more than six months.

SEC. 16. That oleomargarine may be removed from the place of manufacture for export to a foreign country without payment of tax or affixing stamps thereto, under such

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* Now Secretary.

regulations and the filing of such bonds and other security as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe. Every person who shall export oleomargarine shall brand upon every tub, firkin, or other package containing such article the word "oleomargarine," in plain Roman letters not less than one-half inch square.

SEC. 17. That whenever any person engaged in carrying on the business of manufacturing oleomargarine defrauds, or attempts to defraud, the United States of the tax on the oleomargarine produced by him, or any part thereof, he shall forfeit the factory and manufacturing apparatus used by him, and all oleomargarene and all raw material for the production of oleomargarine found in the factory and on the factory premises, and shall be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months no more than three years.

SEC. 18. That if any manufacturer of oleomargarine, any dealer therein or any importer or exporter thereof shall knowingly or willfully omit, neglect, or refuse to do, or cause to be done, any of the things required by law in the carrying on or conducting of his business, or shall do anything by this act prohibited, if there be no specific penalty or punishment imposed by any other section of this act for the neglecting, omitting, or refusing to do, or for the doing or causing to be done, the thing required or prohibited, he shall pay a penalty of one thousand dollars; and if the person so offending be the manufacturer of or a wholesale dealer in oleomargarine, all the oleomargarine owned by him, or in which he has any interest as owner, shall be forfeited to the United States.

SEC. 19. That all fines, penalties, and forfeitures imposed by this act may be recovered in any court of competent jurisdiction.

SEC. 20. That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may make all needful regulations for the carrying into effect of this act.

SEC. 21. That this act shall go into effect on the ninetieth day after its passage; and all wooden packages containing ten or more pounds of oleomargarine found on the premises of any dealer on or after the ninetieth day succeeding the

date of the passage of this act shall be deemed to be taxable under section eight of this act, and shall be taxed, and shall have affixed thereto the stamps, marks, and brands required by this act or by regulations made pursuant to this act; and for the purposes of securing the affixing of the stamps, marks, and brands required by this act, the oleomargarine shall be regarded as having been manufactured and sold, or removed from the manufactory for consumption or use, on or after the day this act takes effect; and such stock on hand at the time of the taking effect of this act may be stamped, marked, and branded under special regulations of the Commissioner of Internal Revenue, approved by the Secretary of the Treasury; and the Commissioner of Internal Revenue may authorize the holder of such packages to mark and brand the same and to affix thereto the proper tax-paid stamps.

Approved, August 2, 1886. (24 Stats., 194; Ri. Sup., 2d ed., 505.)

AN ACT to reduce the revenue and equalize duties on imports, and for other purposes.

. . . . . .

SEC. 41. That wholesale dealers in oleomargarine shall keep such books and render such returns in relation thereto as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require, and such books shall be open at all times to the inspection of any internal-revenue officer or agent. (Ri. Sup., 2d ed., 866.)

. . . . . .

SEC. 53. That all special taxes shall become due on the first day of July, eighteen hundred and ninety-one, and on the first day of July in each year thereafter, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for one year; and in the latter case it shall be reckoned proportionately, from the first day of the month in which the liability to a special tax commenced to the first day of July following. Special-tax stamps may be issued for the months of May and June, eighteen hundred and ninety-one, upon payment of the amount of tax reckoned proportionately under the laws now in force, and such stamps which have

been or may be issued for the period ending April thirtieth, eighteen hundred and ninety-one, may, upon payment of one-sixth of the amount required to be paid for such stamps for one year, be extended until July first, eighteen hundred and ninety-one, under such regulations as may be prescribed by the Commissioner of Internal Revenue. And it shall be the duty of special tax-payers to render their returns to the deputy collector at such times within the calendar month in which the special-tax liability commenced as shall enable him to receive such returns, duly signed and verified, not later than the last day of the month, except in cases of sickness or absence, as provided for in section three thousand one hundred and seventy-six of the Revised Statutes. (Ri. Sup., 2d ed., 869.)

Approved, October 1, 1890.

165-5264538

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

EX PARTE SAMUEL J. McCAULLY. (Original No. 8.)

EX PARTE ISRAEL C. KOLLOCK. (Original No. 9.)

EX PARTE WILLIAM O. LUSBY. (Original No. 10.)

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

EX PARTE SAMUEL J. MCCAULLY. (Original No. 8.)

EX PARTE ISRAEL C. KOLLOCK. (Original No. 9.)

EX PARTE WILLIAM O. LUSBY. (Original No. 10.)

BRIEF FOR THE UNITED STATES.

The petitioners in these three cases were each indicted in the supreme court of the District of Columbia for violating the provisions of the act of Congress approved the 2d day of August, 1886, entitled "An act defining butter; also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine."

They were each arraigned, tried, and convicted, and Samuel J. McCaully was sentenced by the court to pay a fine of $500 and the costs of prosecution, amounting to $28.50, and in default of payment of said fine and cost to stand committed further until paid.

Petitioners Israel C. Kollock and William O. Lusby were each sentenced to both fine and imprisonment, and

all three of said petitioners were, on the 14th day of December, 1896, committed to the custody of the United States marshal for the District of Columbia.

On said 14th day of December, 1896, the three petitioners filed their several petitions in this court, alleging that they were each deprived of his liberty unlawfully and without authority, and that their confinement and imprisonment was in violation of the Constitution and laws of the United States, for the reason that—

> The act under which the said indictments, and each of them, was found is contrary to the Constitution of the United States in this, among other things: That it is not within the power of the Congress of the United States, under the Constitution of the United States, to delegate to the Commissioner of Internal Revenue or the Secretary of the Treasury of the United States, or any other person, authority or power to determine what acts shall be criminal, and the said act of Congress aforesaid dose not sufficiently define, or define at all, what acts done or omitted to be done within the supposed purview of the said act shall constitute an offense or offenses against the United States.

And prayed for a writ of *habeas corpus* to the marshal of the District of Columbia.

On the same day the court ordered Albert A. Wilson, marshal of the United States for the District of Columbia, to show cause before this court at Washington, on Monday, January 4, 1897, why the prayer of said petioners should not be granted.

To this writ Albert A. Wilson, United States marshal for the District of Columbia, made return that he held the bodies of the three said petitioners pursuant to the

judgments and sentences of the supreme court of the District of Columbia until the 14th of December, 1896, when they were each released from custody on bail, in compliance with the orders of this court.

THE CASE.

THE ACT OF CONGRESS OF AUGUST 2, 1886, DOES NOT DELEGATE TO THE COMMISSIONER OF INTERNAL REVENUE OR THE SECRETARY OF THE TREASURY OF THE UNITED STATES, OR ANY OTHER PERSON, POWER TO DETERMINE WHAT ACTS SHALL BE CRIMINAL. IT DOES SUFFICIENTLY DEFINE WHAT ACTS DONE OR OMITTED TO BE DONE SHALL CONSTITUTE AN OFFENSE AGAINST THE UNITED STATES.

The act of Congress (24 Stat., 209) contains several provisions bearing directly upon this question, which will be recited here as far as deemed necessary.

> SEC. 6. That all oleomargarine shall be packed by the manufacturer thereof in firkins, tubs, or other wooden packages, not before used for that purpose, each containing not less than ten pounds and marked, stamped, and branded, as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and all sales made by manufacturers of oleomargarine, and wholesale dealers in oleomargarine, shall be in original stamped packages. Retail dealers in oleomargarine must sell only from original stamped packages, in quantities not exceeding ten pounds; and shall pack the oleomargarine sold by them in suitable wooden or paper packages which shall be marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe.

Every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine in any other form than in new wooden or paper packages, as above described, or who packs in any package any oleomagarine in any manner contrary to law, or who falsely brands any package, or affixes a stamp on any package, denoting a less amount of tax than that required by law, shall be fined for each offense not more than one thousand dollars and be imprisoned not more than two years.

SEC. 15. That all packages of oleomargarine subject to tax under this act that shall be found without stamps or marks as herein provided, and all oleomargarine intended for human consumption which contains ingredients adjudged as hereinbefore provided to be deleterious to the public health shall be forfeited to the United States.

Any person who shall wilfully remove or deface the stamps, marks, or brands on package containing oleomargarine, taxed as provided herein, shall be guilty of a misdemeanor, and shall be punished by a fine of not less than one hundred dollars nor more than two thousand dollars and by imprisonment for not less than thirty days nor more than six months.

SEC. 18. That if any manufacturer of oleomargarine, any dealer therein, or any importer or exporter thereof, shall knowingly or wilfully omit, neglect, or refuse to do, or cause to be done, any of the things required by law in the carrying on or conducting of his business, or shall do anything by this act prohibited, if there be no specific penalty or punishment imposed by any other section of this act for the neglecting, omitting, or refusing to do, or for the doing or causing to be done the things required or prohibited, he shall pay a penalty of one thousand dollars; and if the person so offending be the manufacturer of, or a wholesale dealer in

oleomargarine, all the olemargarine owned by him, or in which he has any interest as owner, shall be forfeited to the United States.

SEC. 20. That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may make all needful regulations for the carrying into effect of this act.

SEC. 21. * * *

And such stock on hand at the time of the taking effect of this act may be stamped, marked, and branded under special regulations of the Commissioner of Internal Revenue, approved by the Secretary of the Treasury; and the Commissioner of Internal Revenue may authorize the holder of such packages to mark and brand the same, and to affix thereto the proper tax-paid stamps.

From which it is manifest that the Commissioner of Internal Revenue is empowered and directed, subject to the approval of the Secretary of the Treasury, to prescribe the manner and form of marking, stamping, and branding the wooden and paper packages in which oleomargarine may be contained, and with making all needful regulations for the carrying into effect of this act.

The specific ground of objection appears to be that the act confers upon the executive officers of the Government the power to prescribe the form and manner of marking, stamping, and branding paper or wooden packages containing oleomargarine and fixes a penalty to be imposed upon persons who may deal in oleomargarine "in any other form than in new wooden or paper packages" as above described, and that this is conferring upon such officers "authority or power to determine what acts shall be criminal," and that the act itself does not in its terms

define the manner and form of marking, branding, or stamping packages, and therefore does not sufficiently declare the act commanded or prohibited.

The contention really being that in order to punish one for selling oleomargarine in packages not marked, stamped, or branded, it must appear that Congress itself has prescribed the forms of such marks, stamps, and brands, and has not delegated to some other person the power and duty of determining such form; that the question really is—

> Whether Congress had, in effect, *fully* declared the offense; and secondly, that the alleged offense does not consist in doing a previously ascertained thing upon any given occasion, or at any given opportunity, but in doing at any time and under any circumstances a thing, the exact nature of which has not been declared by Congress either fully or to any extent, and the *character* of which act and not merely its occasion, is dependent wholly upon the action of the Department. * * *
>
> In the case at bar, however, the alleged offense consists of the doing, at any time, anywhere, and by any person, of an act, the essential definition of which is dependent upon a departmental regulation in this, that whereas the act of Congress denounces the sale of oleomargarine in packages unmarked, it does not designate the marks, the missing of which is the heart of the alleged offense. It is not the occasion on which these marks are omitted which is either the creation or the result of departmental regulation; but it is the absence of the undeclared, unspecified, and—until action by the Department—unknown marks which constitutes the alleged offense.

I have made these extracts from the brief of counsel for petitioners in the lower court.

It may be conceded that Congress, having prohibited the sale of oleomargarine, except in packages marked, stamped, and branded, has cast upon the Commissioner of Internal Revenue the duty of providing a design, form, and figure of such stamps, brands, and marks. And until the Commissioner of Internal Revenue conceives, expresses, and publishes the design or form or figure which he has chosen and determined upon for such stamps, marks, and brands, the law can not be executed or its penalties enforced.

The publication of the results of the work done by the Commissioner of Internal Revenue under this act should be commensurate as to extent and thoroughness with the publication of the act itself. Persons should not be subjected to penalties for the violation of laws which have not been published and made known.

Has adequate publication been made here?

Has it been left possible for any to sin and thereby incur punishment because of want of knowledge or the means of knowledge?

To this Commissioner of Internal Revenue, we have seen, was committed the further duty of "making all needful regulations for the carrying into effect of this act."

Very few general statutes admit of enforcement without the aid of supplemental regulations usually prepared by one or the other of the Executive Departments of the Government.

Prescribing the marks, stamps, and brands by which the packages containing oleomargarine may be identified and taxed is in effect but making a "needful regulation."

The appropriation act of August 15, 1876 (19 Stat., 152), provides:

> * * * And packages of distilled spirits filled on the premises of any wholesale liquor dealer shall thereafter be stamped *under such rules and regulations as the Commissioner of Internal Revenue may prescribe.*

Section 3446 Revised Statutes provides:

> The Secretary of the Treasury and the Commissioner of Internal Revenue may alter, renew, or change the form, style, and device of any stamp, mark, or label used under any provision of the laws relating to distilled spirits, tobacco, snuff, and cigars when in their judgment necessary for the collection of revenue tax, or the prevention or detection of frauds thereon; and may make and publish such regulations for the use of such mark, stamp, or label as they find requisite. But in no case shall such renewal or change extend to an abandonment of the general character of the stamps above mentioned, nor to the dispensing with any provisions requiring that such stamps shall be kept in book form and have thereon the signatures of revenue officers.

This statute has been in force since July, 1868, nearly thirty years, and applies to every subject of internal revenue. It confers upon these executive officers full power to change the form, style, and device of any stamp, mark, or label providing only that the general character of the stamps above mentioned shall not be abandoned.

It is difficult to perceive wherein the power to prescribe the marks, stamps, and brands by which oleomargarine packages may be identified is in excess of or differs in character from the broad power conferred by section 3446, Revised Statutes. Both have the same object, to wit, to secure revenue by internal taxation and to prevent fraud in the collection of such revenue.

The penalties prescribed are alike in each. It was argued in brief of counsel for petitioners in the lower court, "First, that there is an essential and radical difference between the stamps on one hand and the marks on the other; and, secondly, that the oleomargarine act itself discriminates the two by providing that the one shall be evidence of the payment to Government of the taxes fixed by the act and the other a notice to the purchaser of oleomargarine that he is getting that and not a different article." But the obvious reply to both objections will be found in section 3446, Revised Statutes, and the sections immediately following.

Section 3446 is not confined to "stamps," but embraces "stamp, mark, or label."

The subsequent sections contain provisions designed to prevent traffic in spirits, tobacco, snuff, and cigars not in packages stamped, marked, or labeled as required by the statute.

The oleomargarine act is a *revenue*, not a *police*, regulation. It may as well be argued that the Revised Statutes were intended to afford protection to purchasers of distilled spirits, tobacco, snuff, and cigars by giving them notice that they were getting those articles and not

spurious imitations of them as to argue that such was the object of the oleomargarine act.

In *Peters* v. *United States* (33 Pac. Rep., 1031), Judge Burford, in passing upon the right of trial courts to take judicial notice of the regulations of the Land Department and of the construction and force of such regulations, used the following language:

> It has been uniformly held that the heads of the Executive Departments may, with the approval of the President, establish rules and regulations in execution of or supplementary to, but not in conflict with, the statutes defining their powers or conferring rights upon others, and when so adopted such rules and regulations have the force and effect of law. (*U. S.* v. *Symonds*, 120 U. S., 46, 7 Sup. Ct. Rep., 411; *U. S.* v. *Bailey*, 9 Pet., 238; *U. S.* v. *Eliason*, 16 Pet., 291; *Aldridge* v. *Williams*, 3 How., 9; *Gratiot* v. *U. S.*, 4 How., 80; *Ex parte Reed*, 100 U. S., 13; *Smith* v. *Whitney*, 116 U. S., 181, 6 Sup. Ct. Rep., 570; *U. S.* v. *Boggs*, 31 Fed. Rep., 337; *U. S.* v. *Eaton*, 144 U. S., 677, 12 Sup. Ct. Rep., 764.) The courts take judicial notice of the rules and regulations of the Executive Departments of the Government promulgated by authority of law. (*U. S.* v. *Hearing*, 26 Fed. Rep., 744; *Fisher* v. *Hallock*, 50 Mich., 463, 15 N. Y. Rep., 552; *U. S.* v. *Williams*, 6 Mon., 379, 12 Pac. Rep., 851; *Low* v. *Hanson*, 72 Me., 104, 12 Amer. and Eng. Enc. Law, 153.) The courts will take judicial notice of the rules and regulations of the General Land Office. (*U. S.* v. *Hearing*, 26 Fed. Rep., 744, 12 Amer. and Eng. Enc. Law, 153.) The conclusion necessarily follows, deducible from the statutes of the United States, the rules and regulations of the General Land Office, and the adjudications of the court

of highest resort in the nation, that prosecutions for perjury may be maintained under section 5397, Rev. St. U. S., for false swearing in the United States land offices.

In the case of *United States* v. *Bailey* (9 Pet., 238) the Supreme Court of the United States had under consideration the question whether or not the crime of perjury could be based upon an oath required by a rule of the Treasury Department. It was admitted that there was no statute of the United States requiring such oath to be taken, but there was a statute making it perjury to swear falsely in support of any claim against the United States. The statute defined the offense, and the question presented for determination of the court was whether or not the oath was administered by one authorized by a law of the United States. The court sustained the conviction upon the ground that the rule of the Treasury Department permitting oaths of the character required to be made before a justice of the peace was a reasonable regulation and within the powers of the Secretary of the Treasury to protect the Government from fraud. This case has never been repealed, but has been often quoted and approved. It might seem that the later case of *United States* v. *Eaton* (144 U. S., 677; 12 Sup. Ct. Rep., 764) is in conflict with the rule in the Bailey Case, but a close examination of the case will reveal a material distinction. In the Eaton Case, *supra*, the defendant was indicted and tried for failure to keep certain books required to be kept by a rule or regulation of the Treasury Department. There was no law of the United States making it criminal to fail to keep such books, and hence the court held that an offense could not be created by a rule of the Department, or that the failure to do an act required by a rule or regulation would not subject

> the offender to criminal punishment under other provisions of the statute. In the case at bar the crime of perjury or false swearing is defined and the punishment prescribed by statute, and the rules of the General Land Office in no sense create the offense or attempt to make an act punishable not otherwise criminal, viz, false swearing. The act of taking the oath is but one of the material ingredients, and when it is shown to have been administered by a person authorized to administer oaths in such cases in a matter in which an oath is authorized, that ingredient of the offense is complete. We think this class of cases comes squarely within the rule announced by the Supreme Court in the Bailey Case.

In this he refers to the case of *United States* v. *Eaton* (144 U. S., 688), in which this court held that a regulation made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, under section 20 of the act of August 2, 1886, in relation to oleomargarine, requiring wholesale dealers therein to keep a book and make a monthly return showing certain prescribed matters, did not make liable to the penalty imposed by section 18 of the act a wholesale dealer who failed to comply with such regulation, because he had not omitted or failed to do a thing required by law in the conduct of his business. The law had nowhere required a wholesale dealer of oleomargarine to keep any book or make any reports.

But in *Caha* v. *United States* (152 U. S., 211) this court, commenting upon the case of *United States* v. *Eaton*, said:

> This, it will be observed, is very different from the case at bar, where no violation is charged of

> any regulation made by the Department. All that can be said is that a place and an occasion and an opportunity were provided by the regulations of the Department, at which the defendant committed the crime of perjury in violation of section 5392.

So here, in this case, the act of which the defendants are charged in the indictments was not the doing of a thing required or the failure to do a thing prohibited under any regulation of the Treasury Department. The statute itself, in plain and express terms, required that "all oleomargarine shall be packed by the manufacturer thereof in * * * packages * * * marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe." The requirement was that the stuff should be in wooden or paper packages and that it should be marked, stamped, and branded.

These petitioners violated the law in this, that the packages in which their oleomargarine was contained were not "marked, stamped, and branded." Their defense is not that the Commissioner of Internal Revenue had failed to prescribe any marks, stamps, or brands, or had failed to publish what he had prescribed, or that they had no knowledge or means of knowledge of what had been prescribed, but that Congress had no power under the Constitution to leave to this officer the authority and duty of prescribing the forms and devices of such brands, stamps, and marks.

Congress had power to prohibit altogether the sale of oleomargarine. It had power to impose terms and conditions upon which alone it might be sold. It permitted

it to be sold in wooden or paper packages, but it prescribed as an essential condition that all such packages should be marked, stamped, and branded. These are the express terms of the act. Petitioners knew that this was the law. They also knew that the oleomargarine sold by them was not stamped, marked, or branded. They knew that the stamp required was a stamp that had to be purchased from the Government; that it represented the tax imposed by the Government for revenue purposes upon all dealers in oleomargarine for the privilege of conducting such business; they knew that they had not purchased these stamps and had not paid that tax. No *vis major* operated upon them, constraining them to sell oleomargarine; it was a voluntary act on their part; they chose to do it, despite the law.

If the Commissioner of Internal Revenue had failed altogether to perform his duty in prescribing the brand, stamp, and mark required by the statute, still these petitioners would have been wholly without excuse; their redress might then have been sought and found in plain paths.

Congress must, of necessity, in many cases, leave to the executive officers of the Government the duty of performing acts upon the completion of which alone does legislation become effectual.

Congress has many times, by its enactments, made grants of the public lands, the quantity granted being stated in the act; but the location of such lands and their actual ascertainment by metes and bounds, and the delivery of possession, are all left to the officers of the Land Department.

If the gravamen of the complaint be that the stamps, marks, and brands, for the failure to use which petitioners were sentenced to punishment, were not in existence when the act was approved, and that it was unknown and unknowable by the petitioners what such brands, stamps, and marks would be, we reply that precisely the same objection might be urged against the statute imposing a penalty for counterfeiting coin of the United States, for it provides (26 Stat., 742) that every person who makes any die or mold in likeness or similitude as to the design or inscription thereon of any die or mold designated for the "coining or making of any of the genuine gold, silver, nickel, bronze, copper, or other coins of the United States, that have been, *or hereafter may be*, coined at the mints of the United States * * * shall, upon conviction thereof, etc."

This statute applies not only to coins of the United States now existing and well known, but to any coins that hereafter may be designed and adopted as coins of the United States.

If, however, the objection be that some person not a Member of Congress has invented, designed, and proposed the devices, style, and form of the brands, stamps, and marks, we reply that the country would be in a very helpless and deplorable condition indeed if the Constitution made it dependent upon the inventive fertility and resources of those gentlemen alone, whose virtues, to say nothing of their activities, have installed them as Representatives in Congress.

The question of the constitutionality of this act has already been passed upon by the inferior Federal courts.

(*United States* v. *Ford*, 50 F. R., 467; *Prather* v. *United States*, decided June 1, 1896, court of appeals, District of Columbia.)

The opinion of the court in the latter case, delivered by Mr. Justice Morris, is appended hereto.

HOLMES CONRAD,
Solicitor-General.

APPENDIX.

WILKES C. PRATHER, APPELLANT,
v.
THE UNITED STATES OF AMERICA.

CONSTITUTIONAL LAW; "OLEOMARGARINE" ACT CONSTRUED; JUDICIAL NOTICE; SALE BY EMPLOYEE.

1. Section 6 of the act of Congress of August 2, 1886, providing that oleomargarine shall not be sold except in certain packages duly stamped, marked, or branded, the special form or designation of the stamp, brand, or mark to be approved by the Commissioner of Internal Revenue and the Secretary of the Treasury and by them furnished to dealers therein, and making the sale of oleomargarine without such stamp, mark, or brand a penal offense, is constitutional and valid.
2. The act in question is a revenue act, and as such almost of necessity is inoperative until put into operation by the regulations of the Treasury Department and the officers charged with the collection of revenue; and it is to be construed liberally to carry out the purpose of its enactment and its penal provisions are not to be rigidly construed.
3. The regulations adopted by the Treasury Department are not the law itself, but merely in aid of the law.
4. On the trial of an indictment for a violation of its provisions in which the regulations adopted by the Treasury Department in pursuance of the act are alleged, such regulations need not be specially proved, but are matters of which the court will take judicial notice.
5. Proof of a sale by an employee of the defendant at the defendant's place of business, and in due course of business, is sufficient to charge the defendant with knowledge of the sale so as to render him criminally liable under the act.

(No. 575. Decided June 1, 1896.)

Appeal by defendant from judgment of supreme court of District of Columbia, sitting as a criminal court

(Crim. No. 20588), he having been convicted under an indictment for violation of section 6 of the act of Congress of August 2, 1886. Affirmed.

Mr. J. M. Wilson and Mr. Henry E. Davis for the appellant; Mr. Arthur A. Birney, United States attorney for the District of Columbia, for the United States.

Mr. Justice MORRIS delivered the opinion of the court:

This is an appeal from the judgment of the supreme court of the District of Columbia, sitting as a criminal court.

There was an indictment and conviction for a violation of the sixth section of the act of Congress of August 2, 1886, entitled "An act defining butter, and imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine" (24 Stat., 249), sometimes called for the sake of brevity the "Oleomargarine act." The sixth section of this act, which is the section charged to have been violated, is as follows:

"SEC. 6. That all oleomargarine shall be packed by the manufacturer thereof in firkins, tubs, or other wooden packages not before used for that purpose, each containing not less than ten pounds, and marked, stamped, and branded as the Commissioner of Internel Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and all sales made by manufacturers of oleomargarine and wholesale dealers in oleomargarine shall be in original stamped packages. Retail dealers in oleomargarine must sell only from original stamped packages, in quantities not exceeding ten pounds, and shall pack the oleomargarine sold by them in suitable wooden or paper packages, which shall be marked or branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe. Every person who knowingly sells, or offers for sale, or delivers, or offers to deliver, any oleomargarine in any other

form than in new wooden or paper packages, as above described, or who packs in any package any oleomargarine in any manner contrary to law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that required by law, shall be fined for each offense not more than one thousand dollars and be imprisoned not less than two years."

By the bill of exceptions taken in the case, which is a model of its kind and worthy of imitation for its succinctness, and by the assignments of error based thereon, three questions are raised: "First, whether the section in question is a constitutional and valid exercise of legislative power; second, whether the regulations made by the Commissioner of Internal Revenue in pursuance of the act and which were alleged in the indictment should not have been proved at the trial, at which, it seems, judicial notice was taken of them, instead of their being proved; and third, whether a sale by an employee of the appellant at the appellant's place of business, and in due course of that business, is sufficient to charge the appellant with knowledge of the sale so as to make him criminally liable under the act.

1. The act of Congress in question, it will be noticed, is distinctly a revenue act, and so purports to be in express terms. In this it differs from a previous statute of January 25, 1879, enacted only for the District of Columbia, and entitled "An act for the protection of dairymen, and to prevent deception in the sales of butter and cheese in the District of Columbia" (20 Stat., 264), which was purely an exercise of the police power of Congress. As a measure for the levy of taxes in aid of the revenue of the United States, the special execution of the act of August 2, 1886, like the previous internal-revenue laws, to which it was a supplement, was naturally committed to the Secretary of the Treasury and the Commissioner of Internal Revenue; and those

officers, in section 20 of the act, were charged with the making of all needful regulations for carrying the act into effect. It may be suspected from the history of the time that the guise of taxation was only a covert effort to suppress or restrict a fraudulent traffic which had become exceedingly common, that of passing off oleomargarine upon the public as butter. But we are not at liberty to go beyond the plain and express terms of the act, which purported to be merely an act for levying taxes, and which as such it was plainly within the power of Congress to enact for the whole Union, and not alone for the District of Columbia. And construed as a revenue act, it is subject to rules of interpretation and construction somewhat different from those which obtain with regard to statutes enacted in pursuance of the police power. As a revenue act, it is almost of necessity inoperative until it is put into effect by the regulations of the Treasury Department and of the officers therein charged with the collection of the revenue; and as such an act it is to be construed liberally to carry out the purpose of its enactment, and its penal provisions are not to be rigidly construed. (*Smythe* v. *Fiske*, 23 Wall., 374; *United States* v. *Hodson*, 10 Wall., 395.)

The constitutionality of section 6 of the statute is called in question, on the ground that it does not itself completely define and declare any offense against the United States; that it leaves it to the Commissioner of Internal Revenue and the Secretary of the Treasury to determine by their regulation what shall constitute a criminal offense against the United States, inasmuch as they are to determine the stamp or marking, the omission or falsification of which constitutes the offense, as it is claimed; and that this is a delegation of legislative power which it is incompetent for Congress under the Constitution to attempt.

Subject to the limited power of legislation which by immemorial usage may be delegated to the municipal

bodies within its control, and subject likewise to the peculiar and exceptional delegation of legislative authority which Congress may make to the Territorial legislatures of the Territories of the United States, it is a fundamental principle of our jurisprudence that legislative power may not be delegated. And it is equally a fundamental dogma of our law that no more in the domain of the criminal or penal branch of jurisprudence than in any other branch of it can there be a valid delegation of legislative authority. Indeed, the requirement is probably more rigid in criminal than in civil matters that legislation of the character of penal enactment should emanate directly from the ordinary organ of supreme legislative power in the State. (*Stoutenburg* v. *Hennick*, 129 U. S., 141.) And in accordance with this principle it was held by the Supreme Court of the United States in the case of *United States* v. *Eaton* (144 U. S., 677) that a regulation prescribed by the Treasury Department, apparently to carry into effect an act of Congress, could not create a criminal offense against the United States when no such offense had been created by the act itself. (See also the cases of *Morrill* v. *Jones*, 106 U. S., 466, and *Caha* v. *United States*, 152 U. S., 211.)

But we do not think that the criminal liability in the present instance is the creation or the result of departmental or official regulation. It seems rather to fall into the category of offenses indicated in the case of *Caha* v. *United States* (*supra*), in which Congress has fully declared the offense and departmental regulation has merely afforded the opportunity for its commission.

The statute, as we have stated, is a revenue act. It requires departmental action to set it in operation. It imposes a tax upon oleomargarine, precisely as other statutes have imposed similar taxes upon tobacco and intoxicating liquors; and similarly also to those statutes, it imposes restrictions and provides for stringent regulations of the manufacture and sale of the article from

which it is sought to raise the tax. It can not be said that the regulations herein provided to be observed with regard to the manufacture and sale of oleomargarine are any more severe or more restrictive of private right than are those provided with regard to the manufacture and sale of tobacco and intoxicating liquors. And yet we do not understand that the propriety of these latter has ever been seriously or successfully questioned. Nor do we understand that the authority of Congress is questioned to make similar regulations for the more efficient enforcement of the tax which it has thought proper to impose upon the article known as oleomargarine. The argument is that Congress has delegated its power of regulation to the Commissioner of Internal Revenue, and has made into a penal offense the violation of such regulation as that officer should make. The argument does not seem to us to be sound.

The statute prescribes that oleomargarine shall not be sold except in packages of wood or paper, duly stamped, marked, or branded; and it provides that sale thereof without such stamp, mark, or brand shall be a penal offense. The special form or designation of stamp, mark, or brand it does not prescribe; this is what it commits to the Commissioner of Internal Revenue and the Secretary of the Treasury. The Commissioner, with the approval of the Secretary, is to furnish the stamp, mark, or brand, without which the sale of the article is not to be made. We fail to see how this provision differs in principle from the provisions of the internal-revenue act (Revised Statutes, secs. 3395, 3312, 3445, 3446, 3341, 3369, etc.), which direct the Commissioner of Internal Revenue to prepare suitable stamps to be used on packages of cigars, tobacco, and spirits, to change such stamps when deemed expedient, and to devise and regulate the means for affixing them; or from the provisions of law regarding the post-office (sec. 3914 of Revised

Statutes), which prescribe that "the Postmaster-General shall prepare postage stamps of suitable denominations," all of which make it a penal offense to counterfeit, steal, or fraudulently affix or fraudulently remove such stamps. The matter of the designing and preparation of these stamps is an executive duty that is properly remitted by the legislative authority to the proper executive officers of Government; and yet there can be no offense in the premises until the executive officers have acted. Now, it can not reasonably be said that the legislative enactment is incomplete and insufficient when it denounces penalties upon the misuse of stamps thereafter to be provided by the executive officers, or that it is a delegation of legislative authority to executive officers when penalties are provided for the misuse of devices thereafter to be provided by them. To hold otherwise would be to overthrow the whole internal-revenue system, as well as the whole postal system of the United States.

The provision of the statute now before us for consideration is that the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall provide and furnish to the dealers a mark or brand, which does not differ in principle from a stamp, without which oleomargarine is not to be sold and which will be evidence that the tax upon it has been paid; and that any person who knowingly offers for sale any oleomargarine in any other form than in new wooden or paper packages, with the mark or brand so to be furnished by the Commissioner, shall be liable to a prescribed penalty. This is no more than providing that no oleomargarine shall be sold except in packages duly branded so as to show that the tax upon it has been paid. The brand is no more than a receipt furnished by the Commissioner or an evidence of payment given by him to the dealer. We fail to see, therefore, how the requirement of a mark or brand by the Commissioner is a delegation of legislative power to that officer, any more than would be a

requirement that he should give a receipt in writing that the tax had been paid.

The case of *O'Neill* v. *Insurance Co.* (166 Pa. St., 72), cited to the contrary, is not adverse to this position or applicable at all in this connection. In that case it appeared that the legislature of Pennsylvania, for the purpose of checking some of the evils that had resulted from certain practices of foreign insurance companies doing business in that State, had authorized the insurance commissioner of the State to prepare and file in his office a form of standard policy of insurance to be executed by all these companies. There was no provision for the submission of this "standard policy" to the legislature, and there was no possibility even that anyone should know its contents until it was prepared by the commissioner. And yet the statute proceeded to enact that this "standard policy," so to be prepared, and which would of necessity embody most important contracts between those who should become parties to it, should, after it was filed by the commissioner, become the sole and exclusive form of contract for use thereafter in the State. The supreme court of Pennsylvania very properly held the statute null and void, as having devolved upon the insurance commissioner a most extraordinary delegation of legislative authority, inasmuch as it gave that officer a power which the legislature itself should only exercise with the greatest circumspection, that of determining what contracts might thereafter be validly made by and with insurance companies, which became bound by severe penalties to conform to the requirements of the commissioner. This was no mere ministerial or executive duty, but the highest exercise of legislative power. The remodeling of the whole law of contracts in regard to insurance companies could not well be confided by the legislature to an officer. This case is an excellent illustration of the fundamental principle already stated, that legislative power can not be delegated; but it is not

authority to show that an executive officer should not furnish a stamp, or a mark, or a brand to show that a tax had been paid, or that the legislative authority might not provide a penalty for the failure to procure such a stamp, mark, or brand.

We understand that the precise question now before us was raised in the eighth judicial circuit of the United States, in the case of *United States* v. *Ford* (50 Fed. Rep., 467), and decided upon demurrer by Mr. Justice Thayer adversely to the contention of the defendant, which was the same as the contention of the appellant in the case before us. That decision seems to us to be correct in principle; and the case seems to be clearly distinguishable from that of *United States* v. *Eaton* (*supra*).

2. By his second assignment of error the appellant raises the question whether the regulations made by the Commissioner of Internal Revenue in pursuance of the statute, and stated or alleged in the indictment, should not have been proved at the trial by the prosecution. It seems that no proof was offered to be made of them.

It may be doubted whether this question was raised in the court below with sufficient distinctness to authorize us to pass upon it. If raised at all, it must have been by the general instruction requested by the defense that the court should direct a verdict of acquittal. But whether it was sufficiently raised or not, we think the question was decided by the Supreme Court of the United States in the case already cited of *Caha* v. *United States* (152 U. S., 211). There the court said:

"The rules and regulations prescribed by the Interior Department in respect to contests before the Land Office were not formally offered in evidence, and it is claimed that this omission is fatal, and that a verdict should have been instructed for the defendant. But we are of opinion that there was no necessity for a formal introduction in evidence of such rules and regulations. They are matters of which the courts of the United States take judicial

notice. Questions of a kindred nature have been frequently presented, and it may be laid down as a general rule, deducible from the cases, that whenever, by the express language of any act of Congress, power is intrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which courts take judicial notice. Without attempting to notice all the cases bearing upon the general question of judicial notice, we may refer to the following: *United States* v. *Teschmaker*, 22 How., 392, 405; *Romero* v. *United States*, 1 Wall., 721; *Armstrong* v. *United States*, 13 Wall., 154; *Jones* v. *United States*, 137 U. S., 202; *Knight* v. *United States Land Association*, 142 U. S., 161, 169; *Jenkins* v. *Collard*, 145 U. S., 546."

The distinctions sought to be drawn by the appellant that the regulations in the Caha Case were in execution of a plain law, while here they are, as alleged, the law itself, is wholly untenable and unjustified by any authority. We have held already that the regulations in the present case are not the law, but in aid of the law. But if the contrary were the case and the regulations were the law for the violation of which the appellant is held, the position is again untenable, for the simple reason that it is never necessary to offer the law in evidence.

3. The third assignment of error assumes to hold that the jury should have been instructed to acquit the defendant, on the ground that no sale by himself had been proved or offered to be proved.

The proof, as stated in the bill of exceptions, was on the part of the prosecution that "the defendant or someone by him there employed" sold the article specified in the indictment. This was controverted by the testimony

for the defendant. The court, as requested by the defendant, instructed the jury that in order to convict the defendant they must find that he sold the thing offered in evidence as butter; that he sold it as butter, knowing it to be oleomargarine; and that he sold it without its being in a stamped or wrapped package, as required by law; and that he did this, not through ignorance, accidentally, or by inadvertence, but knowingly. And the court further instructed the jury of its own motion that it was sufficient if the article was sold in the defendant's place of business in the usual and ordinary course of business, whether it was sold by himself personally or by a clerk or employee. This stated the law as favorably to the appellant as he was entitled to have it. To hold that the act of the clerk or employee in such cases is not the act of the employer would be to nullify the law and would be contrary to all principle. It is true that it is not the sale of oleomargarine for butter, however dishonest such transaction may be, that is here prohibited; but only the sale of oleomargarine, without its being packed in stamped or branded packages, in violation of the internal-revenue law imposing a tax upon it. As claimed on behalf of the appellant, it was proper for Congress to charge the act with a penalty only in the event of its being done knowingly and intentionally. But knowledge and intention to violate the revenue laws might equally well be charged, whether the act done was the immediate act of the person charged or his authorized act through an employee.

We find no error in the record, and the judgment must be affirmed.

And it is so ordered.

Mr. Justice Shepard dissents from the first proposition stated in the opinion.